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No. 88-1042

In the Supreme Court of the United States

OCTOBER TERM, 1989

ANTONIO DEINDE FERNANDEZ, PETITIONER

v.

BARBARA J. FERNANDEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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25 pp

QUESTION PRESENTED

Whether the Connecticut Supreme Court correctly held that Article 31(1)(a) of the Vienna Convention on Diplomatic Relations permits the Connecticut courts, in this divorce action against an ambassador, to determine the spouses' entitlement to Connecticut real estate, after the nation that the ambassador represents has granted a waiver of the ambassador's diplomatic immunity solely for the purpose of permitting dissolution of the marriage.

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4 G. Hackworth, *Digest of International Law* (1942) 16

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Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 Am. J. Int'l L. 88 (1962) 16

4 J. Moore, *A Digest of International Law* (1906) 16

Office of Protocol and the Office of Foreign Missions, United States Dep't of State, *Pub. No. 9533, Guidance for Law Enforcement Officers* (Mar. 1987) 12

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent Barbara Fernandez is a citizen of the United States. She and petitioner Antonio Deinde Fernandez were married in the United States in 1961.[1] They have three grown children, all of whom were born in the United States. Pet. App. 3a.

In 1974, the parties purchased a home in Greenwich, Connecticut.[2] Although petitioner traveled extensively, he and Mrs. Fernandez occupied the house as husband and wife for ap-

[1] Respondent believes that petitioner is a citizen of Nigeria. Br. in Opp. 1; Pet. App. 4a n.3.

[2] The property was purchased and initially held in the name of a corporation, Santa Barbara Estates U.S.A., Inc., of which respondent was the president and principal shareholder. Pet. App. 3a-4a.

proximately ten years. In late 1984 or early 1985, petitioner voluntarily left the marital home; Mrs. Fernandez has continued to reside there. Pet. App. 3a, 4a; Br. in Opp. 2. A short time later, petitioner became Ambassador and Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique and was accepted as such by the United States. Pet. App. 3a; see Pet. 6 (petitioner was accepted as Ambassador in February 1985).

2. In January 1987, Mrs. Fernandez filed for divorce in Connecticut Superior Court and asked, among other things, for an assignment " 'of all of defendant's right, title and interest in [the Greenwich real estate]' " and "a portion of [Ambassador Fernandez's] estate, support payments and attorneys' fees." Pet. App. 3a (quoting complaint). Ambassador Fernandez moved to dismiss the action on the ground that it was barred by Article 31(1) of the Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3240, T.I.A.S. No. 7502, 500 U.N.T.S. 95, which establishes the immunity of diplomatic agents from the criminal, civil, and administrative jurisdiction of the receiving state, with certain exceptions.[3] In October 1987, the superior court denied the

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[3] Article 31, 23 U.S.T. 3240-3241, provides, in pertinent part:

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

The Convention entered into force for the United States on December 13, 1972. Pursuant to the agreement between the United States and the United Nations (Agreement Regarding the Headquarters of the United Nations, June 26, 1947, United States-United Nations, 61 Stat. 3416, T.I.A.S. No. 1676,

motion to dismiss. Pet. App. 22a-24a. The court reasoned that, under Connecticut law, an action for divorce is a "family relations matter," not a civil action, and therefore does not fall within the scope of the treaty provision granting diplomatic immunity from civil jurisdiction. *Id.* at 23a. The court also ruled, in the alternative, that even if the suit for divorce was a civil action, the court could at least dissolve the marriage without exercising personal jurisdiction over Ambassador Fernandez, because under Connecticut law a dissolution proceeding is an action *in rem* and not *in personam*. *Id.* at 24a (citing, inter alia, *Litvaitis* v. *Litvaitis*, 162 Conn. 540, 545, 295 A.2d 519 (1972)).

Ambassador Fernandez sought and obtained permission for an interlocutory appeal to the Supreme Court of Connecticut. See Pet. App. 2a-3a n.2.[4] After the Connecticut Supreme Court had accepted jurisdiction of the case, the United States requested that the Government of the People's Republic of Mozambique, pursuant to Article 32 of the Vienna Convention, 23 U.S.T. 3241, waive the Ambassador's immunity from the court's civil and administrative jurisdiction with respect to all aspects of the divorce action. See Gookin Aff. para. 4 (June 16, 1988). The Mozambique Government executed a more limited waiver of diplomatic immunity, providing (Pet. App. 6a n.7):

> [T]he People's Republic of Mozambique hereby waives the immunity extended by the United States of America to Ambassador Antonio Deinde Fernandez under the provisions of the Vienna Convention on Diplomatic Relations to the following limited and restricted extent only, viz: to permit the Superior Court for the Judicial District of Stamford/

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11 U.N.T.S. 11), an ambassador serving as a member state's resident representative to the United Nations is entitled to the same immunity under the Vienna Convention as is enjoyed by a diplomatic agent accredited to the United States. Furthermore, pursuant to 22 U.S.C. 254d, an action barred by the immunity provisions of the Vienna Convention must be dismissed. See Pet. App. 5a nn.4, 5.

[4] The United States participated as amicus curiae in the Connecticut Supreme Court to present its view that the reasoning of the superior court was in error. The government contended that, in the absence of a waiver of diplomatic immunity, the Vienna Convention bars divorce actions.

> Norwalk at Stamford, Connecticut, U.S.A. to enter an order dissolving the marital status only between Ambassador Antonio Deinde Fernandez and his wife, Barbara J. Fernandez, in a civil action presently pending in said Court * * *. This limited and restricted waiver of diplomatic immunity does not encompass, and shall not be construed as encompassing, any waiver whatsoever of Ambassador Antonio Deinde Fernandez' diplomatic immunity under said Vienna Convention on Diplomatic Relations from *in personam*, *in rem* or any other type of jurisdiction whatsoever with respect to his person or property or any property in which he may have or claim to have an ownership interest including, without limiting the generality of the foregoing, his immunity from any awards of property and/or alimony that might otherwise be appropriate in any such matrimonial proceeding. The limited purpose of this waiver of diplomatic immunity is solely to permit the marital status only between the parties to be dissolved without Mrs. Fernandez having to institute an action for divorce in the People's Republic of Mozambique.

3. a. The Connecticut Supreme Court affirmed the judgment of the superior court declining to dismiss the action and remanded the case for further proceedings. Pet. App. 2a-16a. The court noted at the outset that, in light of the intervening limited waiver of immunity, there was no longer a dispute about the trial court's jurisdiction to dissolve the marriage. Accordingly, the only question before the state supreme court was whether the trial court, on remand, would have authority to award the real property or other property or money claimed by Mrs. Fernandez in her complaint for divorce. *Id.* at 6a-7a. The state supreme court held that Mrs. Fernandez's claim for the Connecticut real estate was not barred by Article 31(1) of the Vienna Convention but that her other claims were. Pet. App. 6a-7a.

The court first rejected the trial court's view that divorce actions are not within the criminal, civil, or administrative jurisdiction as to which Article 31(1) grants ambassadors immunity. Pet. App. 7a-9a. The court explained that even under Connecticut

law an action for divorce is a civil action. *Id.* at 7a-8a. In any event, the court held, the statements of drafters of the Vienna Convention,[5] together with both post- and pre-Convention case law,[6] made clear that Article 31(1)'s grant of immunity covers divorce proceedings. Pet. App. 8a-9a.

The Connecticut Supreme Court ruled (Pet. App. 9a), however, that Mrs. Fernandez's "claim to the title of the Greenwich home and real estate" came within Article 31(1)(a)'s "real action" exception, which excludes from the general grant of immunity "a real action relating to private immovable property situated in the territory of the receiving State, unless [the diplomat] holds it on behalf of the sending State for purposes of the mission." The court began its discussion of the exception by noting that, in light of the traditionally strong interest of states both in domestic relations and in the ownership and possession of real estate, "but for diplomatic immunity, [Mrs. Fernandez's] claim for real property incident to marital dissolution would readily be entertained by [the state] courts." Pet. App. 10a. While acknowledging that those state interests were overridden by any contrary command of the Vienna Convention, the court explained that, even before adoption of the Convention in 1961, it was generally recognized that diplomatic immunity did not extend to "actions relating to real property." *Id.* at 11a. The court also quoted (*ibid.*) a passage in a Department of State position paper prepared in 1961 (for the United States delegation to the negotiating conference)

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[5] The court quoted (Pet. App. 8a) a statement of the special rapporteur that "he 'could not imagine a proceeding which would not fall under one of the three jurisdictions – criminal, civil and administrative.' 1 Y.B. Int'l L. Comm'n 147 (1958)." The court also quoted (*ibid.*) a statement of one of the drafters that " '[t]he immunity of the diplomatic agent was maintained even in the . . . matter of divorce, because a divorce action under the local jurisdiction was incompatible with his dignity as a diplomat." 1 Y.B. Int'l L. Comm'n. 97 (1957)."

[6] *Shaw* v. *Shaw*, 3 W.L.R. 24, 27, 3 All. E.R. 1, 3 (Fam. 1979) (dicta construing Article 31 to bar divorce proceedings against an accredited diplomat); *Carrera* v. *Carrera*, 174 F.2d 496, 498 (D.C. Cir. 1949) (dismissing action for marital separation, including custody of and support for child, on grounds of diplomatic immunity); *Tsiang* v. *Tsiang*, 194 Misc. 259, 260, 86 N.Y.S.2d 556 (Sup. Ct. 1949) (dismissing marital separation action on grounds of diplomatic immunity). See Pet. App. 8a-9a.

that not only recognized states' exclusive jurisdiction over real property within their borders but explained that, "since actions respecting real property are usually *in rem*, it cannot be argued that an action affecting real property held by a diplomatic agent for non-diplomatic purposes will interfere with the proper performance of his diplomatic functions." 7 M. Whiteman, *Digest of International Law* 407 (1970). Against that background, the Connecticut Supreme Court, stating that the question presented was a matter of first impression (Pet. App. 11a), held that the real action exception in Article 31(1)(a) of the Convention should be construed to allow adjudication of Mrs. Fernandez's "claim for ownership of the family residence * * * in this case, in which the sending state has waived any claim of immunity with regard to the dissolution of the marriage." Pet. App. 12a.[7]

The court's primary ground for its conclusion was that the language of the exception "eschews any technical focus on the *form* of action brought and instead raises the sole question of whether the real property is *itself* the disputed object of the litigation." Pet. App. 12a. Relying on two leading commentators (there being no published cases or drafters' statements construing the real action exception), the court indicated that a "real action" within the meaning of Article 31(1)(a) is one in which the plain-

[7] In a footnote attached to that statement, the court said (Pet. App. 12a n.9) that it need not decide either (a) whether the state courts "would in any case have jurisdiction to dissolve a Connecticut marriage that, in its entirety, antedated the assumption of ambassadorial status" or (b) whether "the trial court's in rem jurisdiction, which is ancillary to its jurisdiction over the status of the marriage, would continue if the sending state's waiver were to be withdrawn."

In its brief *amicus curiae* to the Connecticut Supreme Court, the United States stated, in discussing the action as a whole, that in the absence of a full waiver of diplomatic immunity, the case "must be dismissed except to the extent of the waiver of diplomatic immunity that has been executed." Gov't Amicus Br. 6. In a footnote, the United States addressed specifically the question of the real property exception. It stated first that "the mere fact that real property might be involved in the ultimate resolution of this suit does not bring it within the real property exception," and then concluded: "Because the People's Republic of Mozambique has now waived Ambassador Fernandez's immunity with respect to the dissolution of the marriage, * * * it may be necessary for the superior court on remand to consider the applicability of this exception to such real property as the parties may own." *Id.* at 6 n.3.

tiff claims ownership or possession of real property and seeks, as relief, a declaration of title to, or sale or possession of the property. Pet. App. 12a. This, the court concluded, is such a case (*ibid.*):

> The very object and purpose of [Mrs. Fernandez's] complaint is a vindication of her claimed right of ownership of the real estate. The substance of her claim is that she is entitled to the home as an immediate and essential consequence of her marital dissolution.

Consequently, the court added (*id.* at 13a), permitting adjudication of the real property claim in this case would not, contrary to petitioner's argument, undermine the Convention's general grant of immunity by broadly allowing attachment of realty as a means of satisfying or securing a judgment on an unrelated cause of action. "This is simply not a case where the plaintiff seeks to satisfy a collateral judgment in her favor by forcing the sale or transfer of unrelated real property. * * * When the complaint alleges a direct right of ownership of the thing itself, * * * such a concern finds no basis in law or fact." *Ibid.*

The court found its interpretation of the real action exception bolstered by the Convention's overall approach. Citing the Convention's statement, in its preamble, 23 U.S.T. 3230, that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of [the] diplomatic missions," the court explained that "the overriding emphasis of the Convention is functional"—"justif[ying] immunity by the need to safeguard the actual functioning of the diplomatic mission." Pet. App. 13a. The court agreed with one commentator's view that the immunity provisions of the Convention in particular struck a balance between the immunity and inviolability necessary to protect a diplomat's official functions and " 'the conflicting need to minimise abuse of immunity by diplomats in regard to matters which have nothing to do with their job and to provide a forum for those cases involving land where a plaintiff might otherwise have no other.' " *Id.* at 13a-14a (quoting E. Denza, *Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations* 4 (1976)).

Accordingly, the court remanded the case for "the trial court to determine whether to grant [Mrs. Fernandez] title to the

disputed real property." Pet. App. 14a. The court added that the trial court should also inquire, on remand, whether the Ambassador's interest in the Greenwich home is independently protected by Article 30 of the Convention, which recognizes the inviolability of the "private residence of a diplomatic agent." Pet. App. 14a. The court held, however, that Mrs. Fernandez's claims for support payments and ancillary monetary relief would not be within the scope of the trial court's authority, because those claims are barred by the Vienna Convention. *Id.* at 14a-16a. Unlike the real property claim, the court explained, these additional claims are not excepted from the immunity bar by "a specific treaty provision" (*id.* at 15a); and, contrary to Mrs. Fernandez's contention, whatever due process right she might have to obtain dissolution of her marriage under *Boddie* v. *Connecticut*, 401 U.S. 371 (1971),[8] that right does not encompass any right to "proprietary relief incident to divorce" (Pet. App. 15a-16a).

b. Two judges of the Connecticut Supreme Court dissented in part. Pet. App. 16a-21a. In their view, the real action exception to diplomatic immunity could not properly support jurisdiction over Mrs. Fernandez's claim to the Greenwich home to the extent that the claim, made under Conn. Gen. Stat. § 46b-81 (1986), is predicated specifically on the dissolution of the marriage. The dissenters reasoned that the expressly limited waiver of immunity "cannot serve as a vehicle upon which to predicate any of the relief normally attendant upon a dissolution of marriage." Pet. App. 17a. Rather, they concluded, only the determination of the "present interests of the parties in that real estate," not the transfer of interests between the parties, is within the scope of the real action exception. *Id.* at 18a.[9] To allow the wide-ranging

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[8] The court noted that, in light of the waiver of immunity from dissolution of the marriage in this case, it need not decide whether *Boddie* would entitle Mrs. Fernandez to have access to the Connecticut courts to obtain a dissolution of her marriage. Pet. App. 15a n.12.

[9] Thus, the dissent disagreed with what it described as the "implications" of the majority opinion that such a transfer could be ordered. Pet. App. 16a.

inquiry under Conn. Gen. Stat. § 46b-81 (1986),[10] the dissenters explained, would frustrate the concern of the Vienna Convention's drafters that a divorce proceeding against an ambassador would be ' "incompatible with his dignity as a diplomat.' " Pet. App. 19a (quoting *Summary Records of the 402d Meeting* [1957], 1 Y.B. Int'l L. Comm'n 97, U.N. Doc. A/C N. 4/Ser. A/1957).

In the dissenters' view, however, Mrs. Fernandez's claim for the Greenwich home was not based solely on the dissolution of the marriage. Pet. App. 19a-21a. They stated that she also claimed an equitable interest in the real estate based on her interest in Santa Barbara Estates, the original owner, and on petitioner's alleged improper transfer of title to his name after the parties were separated. *Id.* at 20a. That claim, the dissenters concluded (*ibid.*), "undoubtedly would qualify" under the real action exception of Article 31(1)(a). Accordingly, the dissenters would have remanded the case for consideration of that claim, as well as of Ambassador Fernandez's claim that the Greenwich home is protected as his "private residence" under Article 30. Pet. App. 20a-21a.

DISCUSSION

Petitioner contends that the Connecticut Supreme Court's ruling is erroneous for two reasons: first, that it adopts an incorrect interpretation of the real action exception to Article 31(1)'s general grant of immunity to ambassadors (Pet. 13-19); second, that it relies on a limited waiver of immunity as a vehicle for assuming jurisdiction beyond the scope of that waiver (Pet. 19-21). Neither contention, we believe, warrants this Court's review in this proceeding.

Petitioner's second contention is of substantial concern to the United States, for if the opinion below is construed as petitioner

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[10] That statute allows the trial court, in determining what property to assign from one spouse to the other, to consider "the length of the marriage, the causes for the * * * dissolution * * *, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income." Conn. Gen. Stat. §§ 46b-81(c) (1986).

suggests, it sets a dangerous and erroneous precedent that might be construed as approving the disregard of the terms of waivers of immunity. Nevertheless, we do not believe that the opinion needs to be read as relying on the limited waiver, as such, to support more jurisdiction than the waiver covers.

Petitioner's first question, concerning the correctness of the Connecticut Supreme Court's construction of the real action exception, is presented by the ruling below. That question, however, is a difficult one, and the ruling below on the issue is not itself of substantial concern to the United States or, in our view, of sufficient importance to warrant review. As petitioner acknowledges (Pet. 13-14), this case involves a question of first impression for the courts. And while it would appear that the decision below is final for jurisdictional purposes,[11] the ruling is interlocutory, and it is not entirely clear whether the trial court, on remand, would actually reach the equitable-distribution inquiry that raises the most troubling questions under the Vienna Convention.[12]

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[11] Because petitioner asks this Court to find him immune from suit on *any* property claim made by Mrs. Fernandez, including the property claim that the dissenters in the Connecticut Supreme Court would allow to be adjudicated, his claims in this Court would, if accepted, effectively terminate the only remaining part of the litigation that is contested. For that reason, and because the defense is one of *immunity* with respect to the property claim, we agree with petitioner (Pet. 11-12) that the finality requirement of 28 U.S.C. 1257 is satisfied. See *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 479 (1975).

[12] Government records indicated that, until recently, Ambassador Fernandez held permanent resident status in the United States under the immigration laws. Under Article 38 of the Vienna Convention, petitioner would therefore appear, until recently, not to have been entitled to diplomatic immunity in this case. Article 38(1), 23 U.S.T. 3245, states: "Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions." This divorce action does not involve such official acts, and the United States has not granted additional immunities with respect to the matters at issue here.

Although Ambassador Fernandez contends that he renounced such status in 1985, we understand that the Ambassador has also recently submitted

1. a. The only aspect of the decision below that, in the government's view, has potentially serious implications for international diplomatic practice is the court's reference (Pet. App. 12a) to the limited waiver of immunity filed in the action. Petitioner suggests (Pet. 19-21), in effect, that because of that reference the decision below might be read as holding that a limited waiver of immunity can, as such, have the unintended effect of vesting the courts with jurisdiction beyond the scope of the waiver.[13] So construed, the decision would be incorrect and could cause substantial difficulties in the conduct of international relations.

All of the more than 140 parties to the Vienna Convention accept that the successful conduct of diplomatic relations requires strict recognition of the Convention's guarantees of diplomatic immunity.[14] Consistent with that fundamental feature of in-

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a formal renunciation of that status. In the government's view, that renunciation renders Article 38 inapplicable in any future proceedings in this case. It is the longstanding practice of the Department of State to equate lawful permanent resident status under the immigration laws with being "permanently resident" within the meaning of Article 38 of the Vienna Convention.

[13] The court did not find jurisdiction that violated an express *condition* of the waiver: although the waiver reflects an assumption that the Connecticut courts would only dissolve the marriage, the waiver merely defined what immunity was being waived. Accordingly, the waiver does not by its terms preclude the exercise of any such additional jurisdiction that has another lawful basis; nor is the waiver by its terms rendered inoperative by the assumption of such jurisdiction.

[14] See Senate Comm. on Foreign Relations, 96th Cong., 1st Sess., *Legislative History of the Diplomatic Relations Act* 12-14 (Comm. Print 1979); *Vienna Convention on Diplomatic Relations: Hearing on Exec. H., Before the Subcomm. of the Sen. Comm. on Foreign Relations, 88th Cong., 1st Sess.*, 89th Cong., 1st Sess. 3 (1965) [hereinafter *1965 Hearing*] (testimony of State Department Legal Adviser) ("When a state agrees to receive a foreign diplomatic mission, it assumes under international law the obligation to accord to the mission and its personnel appropriate privileges and immunities. These diplomatic privileges and immunities are not benefits for the individuals concerned, for the diplomats themselves. Instead they are protections which experience has long established are essential to assure the effective performance of the functions of diplomatic missions. These protections are what the United States needs for its missions and personnel abroad, and by the same token these are what

ternational law, although Article 32(1) of the Vienna Convention permits a sending state to waive immunity for its diplomats, Article 32(2) states that "[w]aiver must always be express." To underscore the prohibition on implied waivers, Article 32(4) requires that, even after a civil or administrative proceeding has resulted in a judgment, a separate waiver is required for execution of the judgment. Those provisions require that a receiving state strictly adhere to the terms of any waiver of immunity.

In practice, limited waivers pursuant to Article 32 have proved to be extremely useful in mitigating the sometimes harsh consequences of immunity in situations where permitting jurisdiction would pose no threat to diplomatic functions. The United States, in particular, frequently issues limited waivers to permit members of its diplomatic missions to appear in foreign courts. The principle of strict observance of the terms of limited waivers, to which the United States and the other signatories to the Vienna Convention have scrupulously adhered, provides needed protection to the more than 3500 United States diplomats abroad. Any departure from that principle by the United States would not only be regarded as a violation of the Convention by other nations but could lead to reciprocal action against United States diplomats.[15] The resulting vulnerability of diplomats to unconsented-to jurisdiction, perhaps including civil and criminal charges, could have serious foreign policy and security consequences. In addition, any disregard of the terms of immunity waivers would undoubtedly discourage countries from providing

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the United States must be willing to provide here in the United States. This is the rationale for the convention and proposed legislation.").

[15] The importance of reciprocity, which underlies all relations between nations, is recognized in Article 47 of the Vienna Convention, 23 U.S.T. 3248-3249, and in 22 U.S.C. 254c. See U.S. Dep't of State, *Pub. No. 9162, Digest of United States Practice in International Law* 108-109 (1978). See also Office of Protocol and Office of Foreign Missions, U.S. Dep't of State, *Pub. No. 9533, Guidance for Law Enforcement Officers* 2 (Mar. 1987) ("failure of the authorities of the United States fully to respect the privileges of foreign diplomatic and consular personnel may complicate diplomatic relations between the United States and the other State concerned. It also may lead to harsher treatment of U.S. personnel abroad, since the principle of reciprocity has from the most ancient times been integral to diplomatic and consular relations.").

limited waivers for the officials to appear in other countries' courts, for fear that the terms of the waivers would again be ignored. Such over-protective refusals to waive immunity would often disserve the interests of justice.

b. Notwithstanding these concerns, we believe that the Connecticut Supreme Court decision need not be read as petitioner suggests, and we are for that reason much less concerned about the use of the decision in the future. First, even if the opinion is read as relying on the waiver as such, the decision goes no further than to indicate that a waiver may make applicable an exception to immunity from jurisdiction in the Vienna Convention itself: the court found that the real action exception of Article 31(1) defeated diplomatic immunity with respect to Mrs. Fernandez's real property claim. Hence, the decision could not, under any reading, support a state's use of a limited waiver to find broader jurisdiction not covered by an express provision of the Vienna Convention.[16]

Second, the Connecticut Supreme Court's reference to the waiver of immunity need not, in our view, be understood as reflecting any reliance on the waiver *as such*. Rather, the court's opinion may be read as finding the waiver significant (as a limitation on its present ruling)[17] only because the waiver supplied the necessary substantive predicate (dissolution) for Mrs. Fernandez to raise her claim to property upon dissolution. Since that substantive predicate—dissolution—may be supplied in ways other than by waiver,[18] the court's opinion, so construed, does not raise

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[16] The Connecticut Supreme Court's ruling that there was no jurisdiction to consider the claims for other than real property confirms that an express Vienna Convention exception to immunity was a necessary component of the rationale below.

[17] Indeed, the court did not actually rely on the waiver as part of its analysis, but merely referred to the waiver in order to confine the scope of its ruling, leaving for another day any questions about the applicability of the real action exception in other circumstances. See Pet. App. 12a & n.9.

[18] Thus, under the "divisible divorce" doctrine, dissolution can take place in one jurisdiction (perhaps ex parte, based on the domicile of one spouse only), and adjudication of property and support-obligation issues in another. See Restatement (Second) of Conflict of Laws §§ 71, 77 (1971); *Vanderbilt* v.

any separate question specifically about the use of waivers to sustain jurisdiction beyond their terms.[19] (Nothing in the court's analysis of the real action exception would have been different had the court, in limiting its holding, referred simply to the lack of dispute concerning dissolution instead of referring to the waiver.) Under this interpretation, which we think is a plausible one, the opinion simply presents the question whether the real action exception of Article 31(1)(a) permits the adjudication of equitable-distribution real property claims that arise upon dissolution of a marriage. That question, which does not implicate special concerns regarding adherence to the terms of waivers of immunity, is of course the primary question that petitioner presents.

2. a. In our view, the applicability of the real action exception to this case presents a difficult question. The language of the exception itself—"real action relating to private immovable property"—is hardly clear, as petitioner himself acknowledges (Pet. 14, endorsing commentator's observation that "[t]he

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Vanderbilt, 354 U.S. 416 (1957); *Estin* v. *Estin*, 334 U.S. 541 (1948); *Rozan* v. *Rozan*, 49 Cal. 2d 322, 317 P.2d 11 (1957). In the case of a person having diplomatic immunity in one jurisdiction, such a dissolution might occur in another jurisdiction where no such immunity can be claimed.

We note, too, without here expressing our view on the issues, that the Connecticut Supreme Court left open the questions whether the state courts might be (a) obliged by the federal Constitution (which would override the Vienna Convention) to grant a dissolution of the marriage to Mrs. Fernandez (see *Boddie* v. *Connecticut*, *supra*) or (b) entitled, without violating the Convention, to dissolve the marriage without exercising personal jurisdiction over Ambassador Fernandez (see *Litvaitis* v. *Litvaitis*, *supra*).

[19] We believe the Connecticut Supreme Court may have been thinking along the foregoing lines, given the absence of any other potentially valid view of the role of the waiver in this case. But since no analysis of the law governing divisible divorce was presented to that court, it is not clear to what extent the Connecticut courts would apply Conn. Gen. Stat. § 46b-81 in divisible divorce cases. See Conn. Gen. Stat. § 46b-71 (1986) (party to foreign matrimonial judgment may file judgment in Connecticut courts, which must treat it as Connecticut judgment but may modify it in accordance with the foreign jurisdiction's substantive law); *Taylor* v. *Taylor*, 168 Conn. 619, 362 A.2d 795 (1975) (statutory provision no longer in force, which provided for assignment of property and alimony, construed not to apply in action brought by wife where dissolution previously obtained by husband outside Connecticut).

wording of Article 31(1)(a) contains several ambiguities"). The dual requirement that the action be a "real action" and that it "relat[e]" to real property does, however, seem to imply a two-fold focus on real property, as the decision below and the commentators it relied on both suggest (Pet. App. 12a): first, the relief sought should directly involve the property, in that it would award possessory or ownership interests; second, the substance of the claims being litigated should concern the real property, in that the claims should involve rights in the property.[20] Both conditions, of course, would be satisfied by a classic in rem action (brought to affect the interests in a thing of all persons in the world), but neither the Convention language nor drafters' statements establish that the real action exception is limited to such actions. Indeed, that the exception should be somewhat broader is indicated both by the fact that real actions are covered by an *exception* to the general grant of immunity from jurisdiction over diplomats personally and by the Department of State's 1961 statement, quoted by the Connecticut Supreme Court (Pet. App. 11a; see p. 6, *supra*), that actions respecting real property are "usually" in rem.[21]

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[20] The passages quoted by petitioner (Pet. 14-16), which are themselves not precise or uniform in their definitions of "real action" and which involve contexts quite different from the present, tend to confirm that the phrase, "real action relating to private immovable property," would have been generally understood as having dual focus on the relief sought and on the nature of the claim.

That "real action" and "relating to private immovable property" are not wholly redundant in the provision—and that "real action" suggests that the relief requested involve possession or ownership or the like—is indicated by the fact that the former phrase has in various settings, including notably in civil law countries, been applied to actions involving movable property. See Pet. 16 (Pomeroy notes that, in Roman law, "real action" was not confined to realty); E. Denza, *Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations* 159-160 (1976) (suggesting civil law meaning of "real action" in Article 31(1)(a)); 75 C.J.S. *Real Actions* § 1 (1952); Harvard Law School, *Research in International Law*, 26 Am. J. Int'l L. 15, 164, 174 (Supp. 1932) (pre-Vienna Convention "codifications" that used "real actions" or "realty actions" and applied to personal as well as real property).

[21] Statements from the process of drafting the Convention do not otherwise appear to provide significant additional illumination on the scope of the

The pre-Vienna Convention case-law and practice background involving property and domestic relations is of only limited help in interpreting the Convention as applied in this case. There appears to have been no clearly articulated and uniformly accepted view regarding the scope of a receiving state's jurisdiction to adjudicate disputes involving diplomats and real property, but the cases and treatises suggest, consistent with the dual focus of Article 31(1)(a)'s language, that such jurisdiction was narrowly confined, at most, to suits seeking the award of property interests based on claimed rights in the property.[22] However, no case of which we are aware involved, as the present case does, a claim for real property where the substantive predicate of marital dissolution was present: all of the marriage-related cases either involved claims for general support or maintenance or would have required adjudication of the predicate issue of dissolution.[23] In

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exception. See E. Denza, *Diplomatic Law—Commentary of the Vienna Convention on Diplomatic Relations* 161 (1976) ("There was no discussion of the meaning of 'real action' at any stage of preparation of the Vienna Convention."). See also Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 Am. J. Int'l L. 88, 118-126 (1962) (detailed summary of proceedings leading to promulgation of Convention); *id.* at 120 (quoting 1957 comment by United States that "in respect of real property owned by [a diplomat] in his private capacity * * * court proceedings are usually in rem rather than in personam"). There are apparently no published cases interpreting the exception. See Pet. 14.

[22] See Pet. App. 11a and sources cited; see also *Agostini* v. *De Antueno*, 99 N.Y.S.2d 245, 199 Misc. 191, 17 I.L.R. 295 (Mun. Ct. 1950), (upholding jurisdiction against ambassador in suit to recover possession of real property); *In re Suarez*, 117 L.T.R. 239 (Ch. 1917) (described in Comment, *Immunities of Diplomatic Officers*, 27 Yale L.J. 392 (1918)) (finding immunity from sequestration of property of diplomat in suit to recover on duty owed by diplomat as a private trustee); 4 G. Hackworth, *Digest of International Law* 534 (1942) (Department of State urging recognition of immunity in local attachment case; nature of claim not specified); 4 J. Moore, *A Digest of International Law* 635-639 (1906) (Department of State suggesting immunity in suit by landlord regarding termination of lease).

[23] See *Carrera* v. *Carrera*, 174 F.2d 496 (D.C. Cir. 1949); *Tsiang* v. *Tsiang*, 194 Misc. 259, 86 N.Y.S.2d 556 (Sup. Ct. 1949); *Carbone* v. *Carbone*, 123 Misc.

any event, the Vienna Convention was understood to represent a tightening of standards for immunity, perhaps specifically with respect to the real action exception. See *1965 Hearing* 7, 15 (testimony of State Department Legal Adviser).

b. Against this background, it seems that the real action exception should apply, at its core, to an action brought to settle title (or other ownership or possessory interests) in real property, against the whole world or particular persons, based on preexisting claims of property rights. That much seems not only consistent with the Convention's language and background but necessary to vindicate a state's "strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property * * *." *Shaffer* v. *Heitner*, 433 U.S. 186, 208 (1977); see Pet. App. 10a. In most if not all such cases, moreover, the plaintiff is likely to have access to no other forum with jurisdiction to render and effectively enforce a judgment on the claim; and the real action exception was included in part for the purpose of trying to ensure the existence of a forum for the settlement of property disputes. See Pet. App. 14a. At the other extreme, the real action exception should not cover an action where the substantive claim (*e.g.*, a personal injury claim) has no relation to the real property and where the property serves only as the basis of jurisdiction or as satisfaction of the judgment.[24] If the exception covered such a case, it would, as petitioner suggests (Pet. 14, 17-18), permit the unconsented-to litigation of a vast array of essentially personal claims, making the real action exception a much larger exception to the general grant of immunity than was ever intended. Moreover, an essentially

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656, 206 N.Y.S. 40 (Sup. Ct. 1924). See also *Anonymous* v. *Anonymous*, 44 Misc. 2d 14, 252 N.Y.S.2d 913 (Fam. Ct. 1964) (immunity upheld in paternity proceeding).

[24] See Restatement (Second) of Conflict of Laws §§ 155, topic 2, at 191 (1971) ("In the second type of proceeding quasi in rem, the plaintiff does not assert that he has an interest in the thing, but asserts a claim against the defendant personally and seeks, by attachment or garnishment, to apply the thing to the satisfaction of his claim against the defendant.").

personal claim is far more likely than a classic property claim to require for its adjudication an intrusive inquiry into personal conduct, and any such inquiry implicates the general concerns of the Vienna Convention.[25]

c. The present case falls somewhere between those two extremes.[26] Although the relief requested is clearly the award of ownership (as well as possession) of real property, the substance of Mrs. Fernandez's equitable-distribution claim does not appear to involve a traditional, pre-litigation property right.[27] The claim does, however, directly concern the real property and is based on a statutory grant of entitlement (Conn. Gen. Stat. § 46b-81 (1986)), albeit one that allows a court to define future rights in property by reference to general equitable principles unrelated to the property itself.[28] Moreover, while the Connecticut

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[25] Of course, litigation that falls under the Article 31(1)(b) and (c) exceptions to immunity for successorship issues and for non-official professional and business activities may require quite intrusive and potentially embarrassing inquiries.

The overall functional approach of the Convention cannot serve to distinguish many cases within the real action exception from many outside it, as both classic property claims and ordinary tort claims, for example, may have nothing to do with a diplomat's official functions. The approach does provide a useful one-way negative check on including cases within the exception, as any case in which immunity is required to avoid interference with official functions should presumptively not come within the real action exception.

[26] Although the drafters of the Convention clearly intended that divorce actions would be within the general grant of immunity for "civil" actions, as the court below held, that fact does not mean that an action like the present—where there is no dispute about dissolution and (as relevant in this Court) only real property is claimed—is outside the scope of the real action exception. Hence, while petitioner is correct that the real action exception cannot cover all divorce actions "simply because real property could be involved by way of matrimonial award" (Pet. 18), that proposition does not resolve the present case.

[27] As the dissent below recognizes (Pet. App. 19a-21a), and contrary to petitioner's suggestion (Pet. 13 n.3), to the extent that Mrs. Fernandez is claiming an equitable or legal ownership interest in the Greenwich home by virtue of her interest in Santa Barbara Estates, that claim would seem quite close to a traditional pre-existing property rights claim and may therefore fall within the real action exception.

[28] In a community property jurisdiction that applied a rigid 50% division rule upon dissolution, the property claim would be closer to a traditional, pre-

Supreme Court did not describe Mrs. Fernandez's interest as a property right, as some other jurisdictions apparently have done,[29] it did refer to her "claimed right of ownership" (Pet. App. 12a) and her alleged "direct right of ownership" (*id.* at 13a); if the Vienna Convention issue turned on whether, under local law, Mrs. Fernandez has a vested property right, the state supreme court might well hold that she does. The court also characterized the jurisdiction over the property claim as "in rem jurisdiction." Pet. App. 12a. Furthermore, it is not clear whether Mrs. Fernandez could secure an adjudication of her claim to the Greenwich home in any forum other than the Connecticut courts. On the other hand, while the equitable-distribution claim seems unrelated to any official diplomatic functions, adjudication of the claim might require a quite intrusive inquiry into the Ambassador's personal affairs.[30]

3. The foregoing considerations make the primary question presented by petitioner a difficult one. We do not believe, however, that this Court need grant the petition in order to determine the contours of the real action exception generally or to decide whether the Connecticut Supreme Court correctly applied the exception in this case.

The application of the real action exception in a case like this does not present a question of great significance to international practice. There are no other judicial decisions on the subject;[31] the issue does not seem to have arisen before; and we do not envision any serious adverse spillover effects on other issues from

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existing property rights claim. Cf. 27B C.J.S. *Divorce* § 538 (1986) (equitable division may be appropriate even of community property).

[29] See, *e.g.*, *Questions re Imel* v. *United States*, 184 Colo. 1, 517 P.2d 1331 (1974) (filing of divorce action vests property right, scope of which is yet undefined, in plaintiff spouse).

[30] It may also raise nettlesome practical questions, such as whether, in deciding how much if any of the Greenwich home should be awarded to Mrs. Fernandez, the court must inquire into the *overall* holdings of the parties.

[31] The absence of a conflict among courts is an important consideration in deciding whether this Court should grant certiorari even in a case involving international treaty obligations.

allowing the Connecticut Supreme Court's construction of the real action exception to stand.[32] Moreover, given the interlocutory posture of the present case, it is hardly a certainty that the trial court will actually address the equitable-distribution real property claim, or do so in a manner that implicates serious concerns regarding intrusive inquiries into diplomats' personal affairs. Ambassador Fernandez may yet prevail on his claim that the Greenwich house is protected as his "private residence" under Article 30. Mrs. Fernandez may prevail on the Santa Barbara Estates ownership claim (if the state courts allow her to pursue it, see Pet. App. 14a n.11), a claim that the dissent below recognized as within the real action exception and that raises much less serious concerns about the intrusiveness of judicial inquiry than does the equitable-distribution claim. And the Connecticut Supreme Court has not foreclosed the possibility that judicial inquiry in applying Conn. Gen. Stat. § 46b-81 (1986) should, in light of the Vienna Convention, be more limited than usual.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[32] We are, of course, concerned about just such potential adverse implications with respect to the limited waiver of immunity. Notwithstanding those concerns, we do not think review of the petition is warranted on that basis either, since, as explained above, on close analysis the decision below does not rest on any separate holding concerning the scope of immunity waivers.

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